Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 31, 1977

CERTIORARI GRANTED JUNE 27, 1977

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DOCKET ENTRIES

Proceedings in United States District Court, Middle District of North Carolina—No. C-75-380-G

September 11, 1975—Complaint, with jury demand, filed

November 5, 1975—Answer and Motion of defendant to strike demand for jury trial, filed

December 19, 1975—Initial pre-trial conference and hearing on Motion to strike demand for jury trial

January 21, 1976—Memorandum of Court granting defendant's Motion to strike plaintiff's demand for jury trial

January 29, 1976—Order that plaintiff's demand for jury trial be stricken

February 3, 1976—Amendment to Order of January 29 certifying an immediate appeal

Proceedings in United States Court of Appeals for the Fourth Circuit No. 76-1369

February 23, 1976—Order granting plaintiff's petition for permission to appeal interlocutory order of District Court

October 7, 1976—Appellant Pons' Motion for leave to amend complaint filed

October 14, 1976—Appellee Lorillard's response in opposition to motion for leave to amend complaint filed

October 21, 1976—Letter advising counsel that motion to amend complaint should be presented at oral argument

November 9, 1976—Cause argued before Bryan, Senior Circuit Judge, and Butzner and Russell, Circuit Judges, and submitted

February 2, 1977—Opinion filed and judgment of the District Court vacated and remanded

February 16, 1977—Order granting Appellee Lorillard's motion for stay of mandate filed

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

No. C-75-380-G

(Title omitted in printing)

Complaint

Plaintiff, complaining of defendant, alleges and says:

(1) Plaintiff is a citizen and resident of Greensboro, Guilford County, North Carolina.

(2) Defendant is a foreign corporation, authorized to do business and doing business in the State of North Carolina, with a place of business in Guilford County, North Carolina.

(3) Jurisdiction of this action is founded upon 29 U.S.C. 626(b), (c); 29 U.S.C. 217; and 29 U.S.C. 216(b).

(4) Plaintiff was first employed by defendant on March 3, 1960. As of January 31, 1975, plaintiff had advanced to the position of Financial Services Coordinator. Plaintiff performed all of the duties assigned to her in a professionally competent manner, and plaintiff faithfully followed all instructions given her by her supervisors. Plaintiff abided by all of the rules and regulations of defendant.

(5) Plaintiff was born on June 10, 1926. When she was 48 years of age, on January 31, 1975, defendant and its agents and servants fired her. Plaintiff's dismissal was part of a policy of defendant to discharge older employees and to retain young people as employees wherever possible, to the detriment and discrimination of employees over the age of 40 and under the age of 65. This conduct of the part of defendant, and its agents and servants, was and continues to be willful.

(6) By the acts herein complained of, defendant discriminated, and continues to discriminate, against plaintiff and other persons who are at least 40 years of age but less than 65 years of age. This conduct of defendant is in violation of the provisions of 29 U.S.C. 623(a)(1), which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

(7) At the time of plaintiff's discharge, she was receiving a base salary of $905.00 per month.

(8) On or about June 3, 1975, plaintiff gave notice to the Secretary of Labor, as required by 29 U.S.C. 626(d), of her intent to file this action. The unlawful practice of defendant was not eliminated by the efforts of the Secretary of Labor through methods of conciliation, conference, and persuasion.

WHEREFORE, plaintiff prays of the court:

(1) Enter a permanent injunction against defendant, enjoining and restraining it from failing or refusing to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

(2) Enter an injunction against defendant requiring defendant to reinstate plaintiff as an employee, and thereafter not to discriminate against her because of her age;

(3) Award plaintiff attorney monetary damages consisting of wages from date of discharge to date of judgment, together with an equal amount of liquidated damages;

(4) Award plaintiff reasonable attorney's fee and the costs of this action, to be taxed against defendant;

(5) Grant plaintiff such other and further relief as to the court may seem just and proper.

NORMAN B. SMITH
Attorney for Plaintiff
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Follin & Curtis
704 Southeastern Building
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DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury on all issues of fact in this action.

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-75-380-G

(Title omitted in printing)

Answer of Lorillard, a Division of Loews Theatres, Inc.

Defendant Lorillard, a Division of Loews Theatres, Inc., for its answer to the Complaint herein, avers:

FIRST DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

1.

The allegations of Paragraph 1 of the Complaint are admitted.

2.

The allegations of Paragraph 2 of the Complaint are admitted.

3.

Paragraph 3 of the Complaint, containing no allegations of fact, requires no response.

4.

It is admitted that plaintiff was first employed by defendant on 3 March 1960 and as of 31 January 1975 occupied the position of Financial Services Coordinator. Defendant leaves plaintiff to her proof as to the remaining allegations of Paragraph 4 of the Complaint.

5.

It is admitted that plaintiff was born on 10 June 1926. Plaintiff, together with a number of other employees, was terminated on 31 January 1975 for good cause. The remaining allegations of Paragraph 5 of the Complaint are specifically denied.

6.

The allegations of Paragraph 6 of the Complaint are denied.

7.

The allegations of Paragraph 7 of the Complaint are admitted.

8.

It is admitted that on 3 June 1975, counsel for plaintiff notified the Area Director, Wage and Hour and Public Contracts Division of the United States Department of Labor, by letter of plaintiff's notice of intent to file a civil action to enforce her rights under the Age Discrimination in Employment Act. It is admitted that a representative of the United States Department of Labor reviewed the circumstances involved in this case, but was unable to work out a solution that was agreeable to the parties. Except as herein admitted, the allegations of Paragraph 8 of the Complaint are denied.

WHEREFORE, having answered the Complaint of the plaintiff, this defendant prays that the Court:

(a) Dismiss the Complaint;

(b) Deny the relief requested in the Complaint;

(c) Grant to this defendant such other and further relief as may be just and proper, including its costs, expenses and reasonable counsel fees incurred in the defense of this action.

This the 5th day of November, 1975.

THORNTON H. BROOKS
M. DANIEL MCGINN
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD
P. O. Drawer U
Greensboro, North Carolina 27402
Telephone: 919-273-2591
Attorneys for Defendant Lorillard,
a Division of Loews Theatres, Inc.

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-75-380-G

(Title omitted in printing)

Motion to Strike Demand for Jury Trial

COMES Now defendant Lorillard, a Division of Loew's Theatres, Inc., and moves the Court to strike the request for jury trial heretofore served and filed by plaintiff and to assign the cause to the non-jury calendar on the grounds that no right of trial by jury exists under the Constitution or the laws of the United States as to the issues of fact herein.

This 5th day of November, 1975.

THORNTON H. BROOKS
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD
P. O. Drawer U
Greensboro, North Carolina 27402
Telephone: 919-273-2591
Attorney for Defendant Lorillard

(Certificate of Service omitted in printing)

Notation

The Memorandum of the United States District Court by Gordon, Chief Judge, entered on January 21, 1976, appears as APPENDIX C, pages 7a-12a in the Appendix of Lorillard's Petition for a Writ of Certiorari, filed on March 31, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-75-380-G

(Title omitted in printing)

Order

THIS CAUSE came on to be heard on Defendant's Motion to Strike Demand for Jury Trial and transferring the action to the non-jury calendar, and the Court having heard the argument of counsel, and having considered the briefs and the record, and being fully advised, it is

ORDERED, for the reasons set forth in the Memorandum filed on 21 January 1976 that plaintiff's demand for jury trial be stricken and that this action be placed on the non-jury calendar.

This the 29 day of January, 1976.

EUGENE A. GORDON
United States District Judge

APPROVED AS TO FORM:

NORMAN B. SMITH
Counsel for Plaintiff

THORNTON H. BROOKS
Counsel for Defendant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1976 Term

No. 76-1369

(Title omitted in printing)

Motion of Plaintiff-Appellant for Leave to Amend the Complaint

Now COMES, plaintiff-appellant in the above-entitled case, and respectfully moves this court for leave to amend her complaint upon remand to the District Court, as follows:

1. Add a new paragraph 5A, immediately following the present paragraph 5:

> 5A. By discriminating against plaintiff, defendant acted purposefully and intentionally, willfully, wantonly, oppressively and with a reckless disregard of plaintiff's rights.

2. Add a new paragraph 7A, immediately following the present paragraph 7:

> 7A. In addition to loss of wages, plaintiff has suffered depression and anxiety, and humiliation and embarrassment proximately and directly as a result of defendant's wrongful conduct.

3. Delete the third paragraph of the prayer for relief and substitute therefor:

> (3) Award plaintiff monetary damages consisting of lost wages and all of her other actual damages, statu-

tory liquidated damages, and common law punitive damages;

Respectfully submitted,

NORMAN B. SMITH
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Greensboro, North Carolina 27401
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(Certificate of Service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1369

(Title omitted in printing)

Response by Defendant-Appellee in Opposition to Motion for Leave to Amend the Complaint

COMES Now Lorillard, a Division of Loews Theatres, Inc., defendant-appellee in the above case, and files its response in opposition to the motion of plaintiff-appellant for leave to amend her complaint, and as grounds for its opposition, shows:

1.

Background Information

Plaintiff filed her Complaint in the District Court on 11 September 1975 (Appendix, pp. 4-7). On 5 November 1975, defendant-appellee filed its Answer to the Complaint (A., pp. 8-10), together with a Motion to Strike Demand for Jury Trial (A., p. 11).

An initial pre-trial conference was held before the Court on 19 December 1975, at which time, no request was made by the parties to amend their pleadings, and it was ordered that discovery be completed by 15 April 1976 (A., pp. 12-14).

On 21 January 1976, the Court entered its Memorandum Opinion setting forth its reasons for granting defendant-appellee's motion to strike plaintiff's demand for jury trial (A., pp. 15-25), and an Order to that effect was entered on 29 January A., p. 26).

On 23 February 1976, this Court entered an Order granting plaintiff-appellant's petition for permission to appeal the interlocutory order of the District Court which had granted defendant-appellee's motion that plaintiff's

demand for jury trial be stricken and that the action be placed on the non-jury calendar (A., p. 31).

The Clerk of this Court notified counsel for the parties on 1 October 1976 that the case had been set for oral argument in Richmond on Tuesday, 9 November 1976.

On 7 October 1976, plaintiff-appellant filed in this Court her motion for leave to amend the Complaint in three respects.

2.

Any Motion to Amend the Complaint Should Be Filed with the District Court upon Remand, And Is Not Properly Before This Court

While plaintiff-appellant's motion is addressed to, and filed in, this Court, yet plaintiff seeks leave "to amend her complaint upon remand to the District Court" in the specified respects. A motion to amend a complaint is properly addressed to the District Court, and not to the appellate court. Rules 1 and 15, Federal Rules of Civil Procedure.

The only motion to amend a complaint in the appellate court is one that relates to *defective allegations of jurisdiction*. 28 U.S.C.A. §1653 provides:

> "§ *1653. Amendment of pleadings to show jurisdiction*
>
> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

The instant motion to amend does not purport to relate to deficient allegations of jurisdiction. The Court stated in *First National Bank of Cincinnati* v. *Pepper*, 454 F. 2d 626, 635-6 (2nd Cir. 1972):

> "Finally, two days before the argument of this appeal Mrs. Arlinghaus moved this court to amend the complaint by adding a fourth cross-claim against Pepper arising out of a recent judgment in the amount

> of $19,842.19 rendered by a New Jersey state court in favor of her husband's estate against him. *Except to the limited extent of permitting defective jurisdictional allegations to be amended pursuant to 28 U.S.C. § 1653, we cannot consider a 'new issue, not raised by the pleadings in the District Court or considered by it,' whether raised by motion to amend a complaint or otherwise.* Walker v. Felmont Oil Corp., 262 F.2d 163, 165 (6th Cir. 1958), cert. denied, 361 U.S. 840 (1959) (denying a motion to file a supplemental complaint). Accordingly the motion is denied without prejudice to its renewal in the district court" (emphasis added).

To same effect, *International Ladies' Garment W.U.* v. *Donnelly G. Co.*, 121 F. 2d 561, 563 (8th Cir. 1941).[1]

As the matter pending before this Court relates solely to the issue of whether plaintiff is entitled to a trial of her action before a jury, or before the Court without a jury, the action will perforce be remanded to the District Court and plaintiff-appellant may then and there file such motions for amendment as she is advised.

3.

Motion Fails to Adequately State the Grounds on Which It Is Based

Even if this Court has the power to grant the requested motion, it should deny same under the circumstances here disclosed.

Rule 27, Federal Rules of Appellate Procedure, provides that motions filed in an appellate court "*shall state with*

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[1] This Court in *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865, 871 (4th Cir. 1941), refused to permit an amendment to the complaint by plaintiff as urged at oral argument before the Court, stating: ". . . While we might allow the amendment here, we think it better practice to permit it to be made before the District Court in connection with further proceedings to be had upon the remand."

particularity the grounds on which it [the motion] is based." The motion under review does not disclose why plaintiff-appellant at this late date, and in this forum, seeks to amend her Complaint in the respects mentioned.

As noted above, it is clear that the purpose of the proposed amendment is not to cure any possible deficiencies in the jurisdiction of the Court. As shown, plaintiff had ample opportunity to seek to amend her Complaint in the District Court while the case was there pending, but did not choose to do so, and to defendant's knowledge and belief, discovery has not disclosed any matters that plaintiff overlooked in presenting her claim to the District Court. ". . . [W]e also recognize that the function of Rule 15(a) [Federal Rules of Civil Procedure] is generally 'to enable a party to assert matters that were overlooked or were unknown to him at the time he interposed his original complaint or answer.' C. Wright & A. Miller, 6 Federal Practice and Procedure: Civil § 1473, at 375 (1969). . . ." *Weinberger* v. *Retail Credit Co.*, 498 F. 2d 552, 554, n. 4 (4th Cir. 1974).

Possibly the undisclosed purpose of the proposed motion is to enlarge or change the theory of the cause of action alleged in the original complaint, by basing her cause of action not only on a law of the United States (namely, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634), but also on a common law tort claim. If this is the purpose of the motion, it should be denied because such theory was not raised before the District Court and therefore cannot be raised for the first time before the Court of Appeals. The applicable standard is enumerated in *Walker* v. *Felmont Oil Corporation*, 262 F. 2d 163, 165 (6th Cir. 1958):

> ". . . The taking of the appeal divested the District Court of jurisdiction of the case, transferring it to the Court of Appeals. Thompson v. Harry C. Erb, Inc., 3 Cir., 240 F.2d 452, 454. A new issue, not raised by the pleadings in the District Court or considered by it, can not be raised for the first time on appeal. [Citing cases.]"

The issue reviewed by the District Court in this case was stated in its Memorandum Opinion to be (A., p. 15):

> ". . . The question for the Court's resolution is whether the Seventh Amendment right to trial by jury extends to an action for injunctive reinstatement, lost wages, liquidated damages, and costs and attorney fees under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970)."

If plaintiff-appellant proposes by her motion to pose a different, or additional issue, she cannot do so for the first time before this Court.

Conclusion

For the foregoing reasons, defendant-appellee opposes the motion of plaintiff-appellant before this Court to amend her complaint in the respects mentioned.

Respectfully submitted,

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Attorneys for Defendant-Appellee Lorillard

Dated: 13 October 1976

(Certificate of Service omitted in printing)

Notation

The Opinion of the United States Court of Appeals entered on February 2, 1977, appears as APPENDIX B, pages 2a-7a in the Appendix of Lorillard's Petition for a Writ of Certiorari, filed on March 31. 1977.

Notation

The Judgment of the United States Court of Appeals entered on February 2, 1977, appears as APPENDIX A, page 1a in the Appendix of Lorillard's Petition for a Writ of Certiorari, filed on March 31, 1977.